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In the Supreme Court of the United States

OCTOBER TERM, 1951

F. DONALD ARROWSMITH AND RUTH R. BAUER,
Executors of the Last Will and Testament of
Frederick R. Bauer, Deceased, and Ruth R.
BAUER, ET AL., Petitioners

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court
of Appeals for the Second Circuit.

MEMORANDUM FOR THE RESPONDENT

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 753

F. DONALD ARROWSMITH AND RUTH R. BAUER,
Executors of the Last Will and Testament of
Frederick R. Bauer, Deceased, and RUTH R.
BAUER, ET AL., *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court
of Appeals for the Second Circuit

MEMORANDUM FOR THE RESPONDENT

The Commissioner does not oppose the granting of a writ of certiorari in the above-entitled consolidated cases limited to the question which is common to the cases.

1. The question common to the two consolidated cases is: Where stockholders realize a capital gain

on the liquidation of a corporation and in a subsequent year are required as transferees to pay a judgment against the corporation, whether the amounts paid in settlement of the transferee liability are to be treated in the year of payment as ordinary loss deductions under Section 23 (e) of the Internal Revenue Code (26 U.S.C. 23) or as capital losses under Section 117 of the Code (26 U.S.C. 117).

The decision of the court below that the amounts paid in settlement of the transferee liability should be treated as capital losses conflicts with the decision of the Third Circuit in *Commissioner v. Switlik*, 184 F. 2d 299.

There are a number of other cases involving the same question now pending in the courts. The court below followed its decision in the instant case in *Milliken v. Commissioner*, decided April 10, 1952 (1952 C.C.H. par. 9284), rehearing denied, May 5, 1952. Counsel for the taxpayer in the *Milliken* case stated in the petition for rehearing filed with the Second Circuit that they contemplated filing a petition for a writ of certiorari. The following cases are pending on appeal from various District Courts to the Fifth Circuit:

Clifton v. Allen, 101 F. Supp. 997 (M.D. Ga.)

Eastland v. United States, 103 F. Supp. 182 (W.D. Tex.)

Roy P. Eastland, Sr., et ux. v. United States
(N.D. Tex.), decided November 11, 1951.

Roy P. Eastland, Sr. v. United States (N.D.
Tex.), decided November 11, 1951.

Appeals to the Fifth Circuit from decisions of the Tax Court in *Fain v. Commissioner* and *McGaha v. Commissioner*, decided January 10, 1952 (1952 P-H T.C. Memorandum Decisions, par. 52,004), are also pending.

2. The petitioners' argument (Pet. 10-11) that the court below erroneously disregarded Bauer's personal liability on the judgment raises an issue which is not common to the two consolidated cases; it is an issue that was not involved in *Commissioner v. Switlik, supra*, and upon which there is no conflict of decision. Moreover, although Bauer was jointly and severally liable with the corporation on the judgment,* it would seem that the court below was correct in holding that the accidental fact that Bauer was liable as an officer as well as a transferee did not alter the basic fact that he was required to surrender a portion of the assets he had received as a capital distribution. (R. 19.) Under the circumstances, the court below was warranted in concluding that Bauer's fundamental position in regard to the payment in question was no different from that of the other trans-

* *Trounstein v. Bauer, Pogue & Co.*, 144 F. 2d 379, 382 (C.A. 2d), certiorari denied, 323 U. S. 777.

feree. (R. 19.) Therefore, we respectfully submit that this particular question should be excluded if the writ is granted.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

MAY, 1952.